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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

MICHAEL R.,

Petitioner,

v.

THE SUPERIOR COURT OF FRESNO
COUNTY,

Respondent;

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Real Party in Interest.

F064376

(Super. Ct. No. 07CEJ300298-3)

OPINION

THE COURT*

ORIGINAL PROCEEDINGS; petition for extraordinary writ review. Brian M. Arax, Judge.

Michael R., in pro. per., for Petitioner.

No appearance for Respondent.

Kevin Briggs, County Counsel, and William G. Smith, Deputy County Counsel, for Real Party in Interest.

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* Before Gomes, Acting P.J., Kane, J., and Detjen, J.

Michael R. in propria persona seeks an extraordinary writ (Cal. Rules of Court, rule 8.452) from the juvenile court's orders terminating reunification services at a contested 18-month review hearing (Welf. & Inst. Code, § 366.22, subd. (a))¹ and setting a section 366.26 hearing as to his two-year-old daughter, Madison. He contends the juvenile court erred in finding that he was provided reasonable services and that placing Madison in his care would create a substantial risk of detriment to her safety. He also contends the juvenile court erred in denying his request for a continuance.

Michael seeks an order from this court ordering Madison returned to his custody under family maintenance or an order directing the juvenile court to grant his motion for a continuance. We deny the petition.

PROCEDURAL AND FACTUAL SUMMARY

Michael is the father of Madison, the subject of this writ petition. Michael has a long history of drug use and criminal offenses beginning as a juvenile. Because his history factored into the rulings which we review, we begin our factual summary there.

Michael suffered physical and sexual trauma as a child and developed behavioral problems as a youth. In 1993, Michael, then an early teen, was arrested for residential burglary. He was adjudged a ward of the juvenile court and ordered into formal probation in 1994. In 1997, Michael and several other juveniles attacked and severely beat a man with bats. The man was hospitalized in critical condition. At Michael's adjudication hearing, the juvenile court sustained a delinquency petition charging him with felony assault with a deadly weapon other than a firearm (Pen. Code, § 245, subd. (a)(1)) with a great bodily enhancement (Pen. Code, § 12022.7) and remanded him to the California Youth Authority. In 2009, Michael was incarcerated for burglary.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

From February 2009 to March 2010, the domestic violence unit received 12 calls from either Michael or Madison's mother alleging domestic disturbance or suspicious activity concerning the other. During that time, they were in a relationship and the mother was pregnant with Madison but they did not live together. In two of the calls made in 2009, the mother alleged that Michael assaulted her. Michael was not arrested; however, the mother obtained a restraining order against him. After he violated the restraining order several times, he was arrested in March 2010 for domestic violence.

These proceedings were initiated in July 2010 when then eight-month-old Madison and her half-sister were removed from the custody of their mother (hereafter "the mother") by the Fresno County Department of Social Services (department) because of the mother's methamphetamine use. At the time, Michael was in jail on the domestic violence charges. Madison and her sister were placed together in a risk adopt home.

The mother told the social worker that she and Michael engaged in domestic violence and used drugs together. Michael said he used marijuana daily and methamphetamine one time ten years before. He denied that domestic violence was a problem.

In July 2010, at the detention hearing, the juvenile court ordered Madison and her sister detained and ordered the department to offer Michael parenting classes, substance abuse, mental health and domestic violence assessments and recommended treatment and random drug testing. The juvenile court did not offer the mother any services and set the jurisdictional hearing for August 2010.

Michael was released on September 1, 2010, and two days later, completed a substance abuse assessment with Lawrence Rice. Michael told Mr. Rice that he had used marijuana for 18 years. He said he had been treated for depression and violent behavior and was hospitalized once for psychological problems and counseled on an outpatient basis. He told Mr. Rice he could benefit from mental health treatment for childhood

trauma. Mr. Rice recommended that Michael participate in less intensive outpatient drug treatment and complete mental health and domestic violence assessments. Within the week, Michael completed a domestic violence assessment with Eduardo Acosta. Mr. Acosta recommended that Michael complete child abuse batterers treatment.

In mid-September 2010, the juvenile court conducted a contested jurisdictional hearing, adjudged the children dependents of the court, and set the dispositional hearing for October. Meanwhile, in late September 2010, Michael was evaluated by therapist Chun-Hsiu Hsu who did not recommend mental health treatment because Michael did not report any clinically significant symptoms.

In October 2010, the department recommended in its dispositional report that the juvenile court deny Michael reunification services pursuant to section 361.5, subdivision (b)(12)² based on the 1997 juvenile adjudication which the department erroneously believed constituted a violent felony. The department recommended the juvenile court deny the mother services as well. In addition, the department reported that the mother had not identified any relatives for placement, that Michael's father and stepmother initiated but then withdrew a request for placement, and that the foster parents wanted to adopt Madison and her sister.

The dispositional hearing set for October 2010 was continued and conducted in April 2011. Meanwhile, Michael successfully challenged the applicability of section 361.5, subdivision (b)(12) to a juvenile adjudication and, in March 2011, the department filed an addendum report recommending that the juvenile court provide Michael reunification services.

² Section 361.5, subdivision (b)(12) allows the juvenile court to deny a parent reunification services if the parent was convicted of a violent felony as defined in Penal Code section 667.5, subdivision (c).

In April 2011, the juvenile court conducted a contested dispositional hearing at which it denied the mother reunification services and set a section 366.26 hearing as to Madison's sister. The juvenile court granted the foster parents' request for de facto parent status and ordered a plan of reunification for Michael that required him to complete all the services previously ordered as well as a psychological evaluation/risk assessment. The court set a combined 6- and 12-month review hearing (combined hearing) for September 2011. The mother appeared at the April hearing but her whereabouts subsequently became unknown.

On May 23, 2011, Michael completed a psychological evaluation/risk assessment with psychologist Tamika London. Michael told Dr. London that he was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) as a child and was placed in a psychiatric facility for three months because he kept running away. He said he was not participating in psychotherapy, stating "I believe I'm doing pretty good." He admitted, though, that he could benefit from therapy to manage stress, anger and feeling overwhelmed.

Dr. London asked Michael about his involvement with substance abuse and domestic violence. Michael said that he only used methamphetamine once at the age of 17. He disclosed that he was an alcoholic and attributed his criminal offenses to his alcohol addiction. In her report, Dr. London stated that Michael did not appear to take responsibility for engaging in domestic violence. She said he minimized his actions and attributed the violent incidents between himself and the mother to their different parenting styles.

Dr. London diagnosed Michael with an anxiety disorder and a nonspecified personality disorder with dependent, antisocial, and avoidant personality traits. She also emphatically recommended against reunifying him with Madison at that time. She reported:

“It is this examiner’s very strong opinion that [Michael’s] history of violent criminal activity/behavior, domestic violence, and substance abuse present substantial risk to his young daughter. He does not exhibit personal insight, accountability or responsibility for his actions and appears to lack an understanding about his daughter’s needs and how his actions have affected her. It is this examiner’s strong opinion, based on extensive review of records and in person psychological-risk assessment, that [Michael] does not have the capacity to provide his daughter with a loving, stable, nurturing, and safe environment at this time. It is unlikely that he would be able to develop this capacity within the next one to two years given his lack of insight, lack of accountability, and lack of appreciation of his need for intense intervention. Rather, it appears, that he says what he thinks needs to be said and heard in order to accomplish his goals.”

In June 2011, Michael tested positive for methamphetamine. He was referred for 30 days of residential drug treatment. During his intake interview, he stated that he had used alcohol, methamphetamine and marijuana for 10 years.

In July 2011, Michael completed a psychological evaluation/risk assessment by psychologist Laura Geiger. Michael told Dr. Geiger that he lived with his adoptive mother who was very supportive and that he was an extern for a paralegal program. He said he did not have significant mental health issues but reported that he felt there was something wrong with him. He reported feeling suicidal as an adolescent and once choked himself when he was in a group home until he nearly lost consciousness.

Dr. Geiger diagnosed Michael with ADHD and a nonspecified personality disorder with schizotypal and borderline traits. She explained that Michael did not have a disabling mental disorder but had a “personality pathology that [hindered] his functioning in day-to-day life. Namely, he has a personality disorder with mixed pathology that is marked by magical thinking (premonitions, feeling that others may control him at times) and some affective instability especially in interpersonal relationships.” Dr. Geiger also stated that Michael admitted to engaging in domestic violence and was able to describe coping skills to prevent relapsing into that behavior. She said he had some insight into his thoughts being different and was receptive to receiving treatment.

Dr. Geiger characterized Michael's risk of abuse as "low to moderate" if he continued his mandated services and had the support of family and county services. She recommended a medication evaluation for ADHD, continuing substance abuse treatment and follow-up, 12 weeks of individual cognitive therapy for negative self evaluation distortions and completion of domestic violence treatment.

On September 9, 2011, social worker Jennifer Wild met with Michael to discuss the results of the psychological evaluation/risk assessments. She told him that, according to the reports, Madison would be at a substantial risk if placed in his custody and that he had a personality pathology that hindered his daily functioning. As a result of the findings, she told him, the department was recommending termination of services. Michael told Ms. Wild that he felt therapy would help in dealing with the personality pathology.

In November 2011, Michael's attorney challenged the reasonableness of mental health services in a statement of contested issues. That same month, the department filed an addendum report, recommending that the juvenile court continue reunification services to the 18-month review hearing and order a second mental health assessment.

On November 23, 2011, at the combined hearing, county counsel requested that the juvenile court continue Michael's reunification services to the 18-month review hearing and order a second mental health evaluation. Michael's attorney stated she did not believe Michael had received reasonable services and requested therapeutic supervised visits. At the conclusion of the hearing, the juvenile court found that the department provided Michael reasonable services and that he made moderate progress. The court continued services to the 18-month review hearing which it set for January 2012, ordered Michael to participate in a second mental health evaluation, and ordered therapeutic supervised visits. Michael appealed from the juvenile court's reasonable services finding which we affirmed (F063738).

On December 19, 2011, Michael participated in a second mental health assessment with therapist Rande Wood, MFT. Ms. Wood did not recommend mental health treatment and reported, “Client reports that he has no [mental health] symptoms that would warrant [mental health] treatment and was unable to create a [mental health] plan of care with this therapist. It appears that client has many unresolved [mental health] issues that impair his daily functioning and interpersonal relationships.”

In January 2012, the juvenile court continued the 18-month review hearing to February. Meanwhile, Michael and Madison began weekly two-hour therapeutic supervised visitation with therapist Tammy Exum. In a letter to the department in February 2012, Ms. Exum reported that the visits were structured so that the foster mother stayed in the visitation room for the first 20 to 30 minutes so that Madison was comfortable with her leaving. She said Madison transitioned well each time the foster mother left the room and did not fuss or cry. She said that Michael arrived early for each visit and came prepared with coloring books and crayons, snacks, and an occasional gift. Ms. Exum reported that Michael was attentive to Madison and they engaged well in play together. She said that Michael was cooperative and was working to develop a closer bond with Madison.

Also during this interim period, Ms. Wild spoke to Linda Sherlock, facilitator for the batterer’s intervention program regarding Michael’s progress. Ms. Sherlock stated that Michael had gained some insight into his use of power and control in relationships, but was not connecting the painful issues from his past to the ineffective choices he made. She believed he may have some mental health issues and would benefit from one-on-one therapy. Ms. Sherlock said she had a 45-minute one-on-one session with Michael and she was better able to connect with him that way than in the group setting.

In its report for the 18-month review hearing, the department recommended the juvenile court terminate Michael’s reunification services. It was concerned about

Michael's mental health status and Madison's lack of attachment to him. The department reported that Madison's foster parents had adopted her sister and wanted to adopt her as well.

In February 2012, the juvenile court conducted the contested 18-month review hearing. By that time, Michael had completed all of his court-ordered services and was testing negative for drugs. At the hearing, he argued for custody of Madison, contending the department failed to prove that it would be detrimental to place her in his care. Alternatively, he asked the court to exercise its discretion under section 352 and continue reunification for the purpose of transitioning Madison into his custody. He also argued that the department failed to provide him reasonable mental health services and visitation.

Michael and Jennifer Wild testified at the contested hearing. Ms. Wild testified that Madison did not display toward Michael the kind of behavior a child displays toward a parent. She said that, during the visits she observed, Madison did not show any excitement upon seeing Michael and ran to her foster mother at the end of visits without first hugging or kissing Michael.

Ms. Wild further testified that Michael first told her that he needed therapy in August 2011, but she did not refer him for it because the combined hearing was approaching and she thought his services would be terminated. At the end of November 2011, she referred him for therapy and was told he needed to first complete another mental health evaluation.

On cross-examination, Ms. Wild testified that, at the beginning of the dependency, she did not believe Michael should receive reunification services because of his juvenile adjudication. She also said that Madison was placed directly in a risk adopt home rather than a foster care home, not because the department planned to deny Michael services, but rather to keep the sisters together. Asked why she did not refer Michael to a therapist after Dr. Geiger recommended it, Ms. Wild testified that she contacted the mental health

agency and was told that Michael would need to complete another mental health evaluation before he could be referred to a therapist.

Michael testified that he did not know what behaviors would qualify him for counseling, but said he would be willing to participate in counseling if the professionals said he needed it. He said that Rande Wood asked him if he had any issues that would warrant mental health treatment. He told her that he could not evaluate himself and that he was there to see if he needed help. He denied telling her that he did not want treatment or that he would not participate in it.

Michael further testified that he lived with his mother and had a family plan in the event Madison was placed in his care. He said he attended Alcoholics/Narcotics Anonymous meetings twice weekly as well as 12-step meetings. He also testified that the foster mother's presence at visitation affected his ability to bond with Madison but he never raised it as a concern.

At the conclusion of the hearing, the juvenile court found it would be detrimental to return Madison to Michael's custody, denied Michael's request for a continuance and terminated his reunification services. In doing so, the court provided a lengthy explanation of its reasoning. With respect to risk of return, the court concluded that Michael's juvenile and adult crimes and drug use during the dependency supported a finding that Madison would be at risk in Michael's care. As to the reasonableness of mental health services, the court concluded that the department's efforts to provide them to Michael were reasonable, but that his problems were pervasive and his insight into them very limited. The court also stated it did not fault the department for Michael's inability to progress in visitation. The court set a section 366.26 hearing to implement a permanent plan.

Michael challenged the setting of the section 366.26 hearing by writ petition and appeared for oral argument.

DISCUSSION

I. Detriment

Michael contends that the juvenile court erred in finding that Madison would be at a substantial risk of detriment if placed in his care. He further contends that the evidence shows that he completed his court-ordered services and benefitted from them and that he regularly visited Madison. Therefore, he argues, the juvenile court should have placed her in his custody. We disagree.

At the 18-month review hearing, there is a statutory presumption that a dependent child will be returned to parental custody unless the juvenile court finds, by a preponderance of the evidence, that the return of the child would create a substantial risk of detriment to the child's safety, protection or well-being. (§ 366.22, subd. (a).) Though a parent's participation and progress in a court-ordered reunification plan is a significant factor in assessing detriment, it is not determinative. (*In re Dustin R.* (1997) 54 Cal.App.4th 1131, 1141-1143.) Rather, the ultimate question is whether the parent has the capacity to provide for the child's safety and well-being. (*Ibid.*)

The issue in this case with respect to detriment was not whether Michael could complete his court-ordered services. He did and that is not in dispute. The real question was whether Michael could provide for Madison's safety as well as her physical and emotional needs. The juvenile court found that he could not and the evidence supports its finding.

Dr. London assessed the risk of placing Madison in Michael's care as "substantial" based on Michael's history of violent criminal behavior, domestic violence and substance abuse and his lack of insight into his behavior. Though Dr. Geiger's risk assessment was more favorable, she still identified a "low to moderate" risk of abuse. She also opined that Michael had a "personality pathology" that interfered with his daily functioning and interpersonal relationships. Ms. Sherlock, who was able to observe

Michael over a period of time in a group setting, also commented on and was concerned about his lack of insight into his behavior. From this evidence, the juvenile court could reasonably find by a preponderance of the evidence that Madison would be at risk of physical abuse if placed in Michael's custody.

At oral argument, Michael for the first time argued that the juvenile court was prohibited from considering his criminal history subsequent to Madison's removal pursuant to section 16504.5, subdivision (f)(1).³ We decline to address this issue raised for the first time at oral argument and deem it to be waived. (*Kinney v. Vaccari* (1980) 27 Cal.3d 348, 356-357, fn. 6.) In any event, we conclude that the statute is not directed to the juvenile court and therefore not applicable. Even if it were, it does not preclude consideration of a person's criminal history prior to removal. Most importantly, we do not believe the juvenile court is constrained in considering relevant evidence, including a parent's criminal history, past or present, in assessing detriment to a child.

In summary, we conclude on this evidence that substantial evidence supports the juvenile court's finding that placing Madison in Michael's custody would create a substantial risk of detriment to her safety and well-being.

³ Section 16504.5 entitled "State summary criminal history information; child welfare agency seeking information" provides in subdivision (f)(1):

"A state or county welfare agency may submit to the Department of Justice fingerprint images and related information required by the Department of Justice of parents or legal guardians when determining their suitability for reunification with a dependent child subject to the jurisdiction of the juvenile court, for the purposes of obtaining information as to the existence and content of a record of state or federal convictions and state or federal arrests, as well as information as to the existence and content of a record of state or federal arrests for which the Department of Justice established that the person is free on bail or on his or her own recognizance pending trial or appeal. Of the information received by the Department of Justice pursuant to this subdivision, only the parent's or legal guardian's criminal history for the time period following the removal of the child from the parent or legal guardian shall be considered."

II. Reasonableness of Services

Michael contends that the juvenile court erred in finding he was provided reasonable services, citing the department's failure to provide mental health therapy and promote Madison's attachment to him through visitation. He also contends that services were not reasonable because Ms. Wild advocated for Madison's adoption, thus undermining his ability to reunify. We disagree.

Michael appealed from the juvenile court's reasonable services finding from the November 2011 combined 6- and 12-month review hearing (combined hearing). On appeal, he raised the same arguments he now raises on his writ; i.e. that the department's failure to provide mental health therapy and promote his attachment to Madison through visitation was unreasonable. We affirmed the juvenile court's reasonable services finding issued at the combined hearing.⁴ In doing so, we concurred with the juvenile court that the department's efforts to provide Michael services were reasonable from the inception of dependency proceedings up to the time of the hearing. Thus, on the writ, we review those contentions Michael raises as to the reasonableness of services that pertain to services provided after the combined hearing.

At oral argument, Michael argued that the department failed to modify his services plan to address his need for mental health therapy and visitation to facilitate Madison's attachment to him. According to the record, however, there was no basis for modifying Michael's services plan to include therapy when the results of two mental health assessments indicated that he did not need it. As to visitation, Michael's attorney asked the juvenile court at the combined hearing in November 2011 to order therapeutic

⁴ Michael asked this court to take judicial notice of the appeal and the facts and arguments it contains. Though the appeal is complete, we considered the reasonable services arguments raised by appellate counsel in reviewing the reasonable services arguments raised by Michael on this writ. We grant Michael's request and take judicial notice of the record on appeal (F063738) as well as our opinion.

supervised visitation so that Michael could strengthen his relationship with Madison. The juvenile court ordered therapeutic supervised visitation and Michael and Madison had their first such visit in January 2012. Thus, even though the department did not update Michael's services plan to reflect the modification in visitation, the juvenile court ordered it and the department provided it. As to Michael's contention that Ms. Wild advocated for adoption, we find no evidence of that in the record.

We conclude substantial evidence supports the juvenile court's finding that Michael was provided reasonable services.

III. Continuation of Reunification Services

Michael contends that the juvenile court erred in not continuing reunification pursuant to section 352 for a brief period in order to transition Madison into his custody. We disagree. The juvenile court may continue a dependency hearing beyond the time within which the hearing is required to be held provided the continuance is not contrary to the best interest of the child. (§ 352, subd. (a).) We review the court's decision not to continue a hearing for abuse of discretion. (*In re Ninfa S.* (1998) 62 Cal.App.4th 808, 810-811.)

In this case, the juvenile court denied Michael's request for a continuance, finding there was insufficient progress to warrant it. Given Michael's moderate progress and Madison's need for permanency, we find no abuse in the juvenile court's decision not to continue reunification. We find no error on this record.

DISPOSITION

The petition for extraordinary writ is denied. This opinion is final as to this court.